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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 610

INTERNATIONAL TYPOGRAPHICAL UNION,
a Voluntary Association,
Petitioner (Appellant Below),

vs.

COUNTY OF MACOMB, a Municipal Corporation,
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT,
a Public Quasi Corporation,
BOARD OF SUPERVISORS OF MACOMB COUNTY,
GEORGE T. SMITH, Drain Commissioner of Macomb County,
CARL B. BRANDENBURG, Treasurer of Macomb County,
Respondents (Appellees Below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

SUBJECT INDEX

	Page
Counter-Statement of Facts	1-4
Argument	5
I. Petitioner's Alleged Cause of Action Is Barred by the Application of the Doctrine of Res Adjudicata	6-31
A. The Doctrine of Res Judicata is Applicable to this Case	7-8
B. The Federal Action for Recovery on the Martin and Branches Drain District Bonds Was a Class Suit	8-14
C. The Decree in the Federal Suit on the Martin Bonds Is Res Judicata as to the Rights of Petitioner in This Case	14-25
D. Cases Cited by Petitioner Are Not Applicable to Facts in This Case	25-26
E. The Case of Keefe, et al., v. Martin and Branches Drain District, et al., supra, Was a Proceeding in Rem	26-28
F. The Present Suit Is Barred by a Prior Judgment of the Macomb Circuit Court in the Case of Township of Erin v. County of Macomb, Macomb County Board of Supervisors, Macomb County Drain Commissioner and Macomb County Treasurer, Chancery No. 8505	28-31
II. The Macomb Circuit Court and the Michigan Supreme Court Decided This Case Solely on the Grounds of Res Adjudicata	32
III. Conclusion	33-34

CASES CITED

	Page
American State Savings Bank, Trustee, v. American State Savings Bank, 288 Mich. 78	6, 20
City of Detroit v. Detroit United Railway, 226 Mich. 354	6, 17, 20
City of Highland Park v. Clark, 300 Mich. 501	30
Erie R. R. v. Tompkins, 304 U. S. 64	27
Hansberry v. Lee, 311 U. S. 32	15-17, 26
Hartford Life Ins. Co. v. Ibs, 237 U. S. 662	26
Keefe, et al., v. Martin and Branches Drain District, et al., 119 Fed. (2d) 157	2, 4, 5, 7-8, 13, 14, 23, 24, 27, 28, 29, 33
Keefe v. Mound Park Drain District, No. 5736, District Court of U. S., E. D., So. Div.	11, 25
Keefe v. Royal Oak Drain District, 87 Fed. (2d) 787	11, 24
Kersh Lake Drainage District v. Johnson, 84 L. Ed. 634	29, 33
Pennoyer v. Neff, 95 U. S. 714	15
Smith v. Swormstedt, 16 How. 288	26
Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356	26
Township of Erin v. Englebrecht, Macomb County Chancery No. 8505	2, 4, 5, 28, 33

STATUTES, CONSTITUTIONAL PROVISIONS AND TEXT BOOKS CITED

Statutes:

Judicial Code, Sec. 237 (b), 43 Stat. 937, 28 U. S. C. A. Sec. 344 (b)	5
United States Constitution, 5th and 14th Amendments	4

Text Books:

	Page
30 American Jurisprudence 908	7
Montgomery's Manual of Federal Jurisdiction and Procedure, Third Edition, page 540	12
2 Moore's Federal Practice 2220	13

Court Rules:

Equity Rule 48	12
Equity Rule 38	12, 13
Rule 23, Federal Rules of Civil Procedure	12, 13

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COUNTER-STATEMENT OF FACTS

Petitioner in its Summary Statement of Facts, after setting up the allegations in its bill of complaint and the fact that respondents filed a motion to dismiss, states that the principal ground of the motion to dismiss, and the

only ground considered by the trial court, was the ground of *res adjudicata*. The claim of *res adjudicata* was based upon a decision of the Circuit Court of Appeals, Sixth Circuit, in the case of *Keefe, et al., v. Martin and Branches Drain District, et al.*, 119 Fed. 2d. 157 (certiorari denied by the United States Supreme Court October 13, 1941, 314 U. S. 649, 86 L. Ed. 521) and the decision of the Macomb Circuit Court in the case of *Township of Erin v. Engelbrecht*, Macomb County Chancery No. 8505 (Record 66, 67). The said case of *Keefe, et al., v. Martin and Branches Drain District, et al., supra*, was a class action on behalf of all the bondholders of the class, including petitioner, and all bondholders of the class were therefore bound by the proceedings therein the same as if all bondholders had been nominal parties plaintiff in the suit. It was so held by the District Court in the case of *Keefe, et al., v. Martin and Branches Drain District, et al.* (R. 82, 83, 92), and the Circuit Court of Appeals in said case, 119 Fed. 2d. 157, also held that the action was a class action (R. 18, 19), and that all Martin drain bonds are void (R. 31, 32).

Attorneys for plaintiff bondholders in the Federal case who are the same attorneys who now represent petitioner in this case, repeatedly stated in the bill of complaint in the Federal case that the action was a class action on behalf of all the bondholders (R. 40); that the plaintiffs in said Federal case and all the other bondholders had a common interest in the subject matter of the suit (R. 40, 89); that the plaintiffs in the Federal case intended by bringing the suit that the adjudication would be binding upon all the holders of Martin bonds (R. 41, 89). The attorneys who now represent the petitioner in this case made the above statements under oath in the bill of complaint in the Federal case (R. 88, 89). In a brief filed with the United States Supreme Court in the Federal case the same counsel who now represent petitioner in this

case stated that if in any other suit bondholders were to seek to recover on their bonds the plea of *res judicata* would be raised and would be sustained (R. 93, 94).

In addition to the fact that petitioner was a member of the class on whose behalf the case in the Federal Court was prosecuted the petitioner filed a brief in said case in the Circuit Court of Appeals (R. 95, 104) and in the United States Supreme Court (R. 104). Petitioner knew of the pendency of the Federal class action (R. 102, 103, 104) and has been active in litigation involving various Michigan drains (R. 95, 106, 107). The decision in one of said cases (*Baker et al. v. Ruddiman Valley No. 3 Drain District*), in which petitioner herein was the plaintiff, was largely influential in causing the District Court in the Federal case on the Martin bonds to hold in favor of the bondholders (R. 106, 107). In said Baker case the petitioner was represented by the same counsel who now represent it in this case and who represented the bondholders in the Federal case on the Martin bonds.

The Michigan Supreme Court in this case adopted in full the opinion of the lower court, which based its decision solely on the ground of *res adjudicata,* and then went on to say:

> "Even were we to hold that the lower court was in error in its reasons for the dismissal of the bill of complaint, which we do not, we would feel compelled to affirm the decree of dismissal by reason of the rule of *stare decisis.*"

The basis of the Michigan Supreme Court decision in this case was *res adjudicata* rather than *stare decisis.*

Petitioner, for jurisdictional reasons, now seeks to inject into this case a Constitutional question which was not before the Macomb Circuit Court or the Michigan Supreme Court. Petitioner did not raise the Constitutional question which it now seeks to argue until it filed a motion for rehearing before the Michigan Supreme Court.

The said motion for rehearing was denied. The Constitutional question which respondent now seeks to raise was not raised in the "Statement of Questions Involved" nor in the "Errors Relied upon for Reversal" in the brief for plaintiff and appellant filed with the Michigan Supreme Court. The only time plaintiff and appellant in the Michigan Supreme Court mentioned the Constitutional requirement for due process was in connection with its claim that the lower court had in part based its decision on the ground of *stare decisis*. However, an examination of the opinion of the trial court and the Michigan Supreme Court (Record 157-168) readily proves that the case was not decided on the ground of *stare decisis* and any reference to the Constitutional question in this regard is not important here.

In the case of *Keefe, et al., v. Martin and Branches Drain District, et al., supra,* the Circuit Court of Appeals held in addition to other reasons for holding in favor of the defendant Drain District, et al., that the decision in the case of *Township of Erin v. Engelbrecht* is *res adjudicata* as to the issues in the said Keefe case (Record 34-36). Keefe, et al., representing all the Martin Drain District bondholders, petitioned this court for certiorari, alleging that the decision of the Circuit Court of Appeals deprived the bondholders of due process of law, in violation of the Fifth and Fourteenth Amendments. This court denied certiorari on October 13, 1941, and subsequently denied a petition for rehearing. It therefore appears that the identical claim now before this court was before this court in the case of *Keefe, et al., v. Martin and Branches Drain District, supra,* and that this court denied certiorari.

ARGUMENT

We respectfully submit that the reasons relied upon by petitioner for the allowance of the Writ of Certiorari do not entitle it to the writ.

Petitioner has failed to establish the basis of jurisdiction invoked under Section 237(b), Judicial Code, on page 2 of the petition. Petitioner claims that this case comes within Section 237(b) but does not point out where in the lower court "any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution" or otherwise, and an examination of the record will disclose that no such title, right, privilege or immunity was specially set up or claimed by either party until after the decision of the Michigan Supreme Court.

An examination of the "Questions Presented by the Petitioner" and the "Reasons Relied upon for Allowance of the Writ," on pages 7-9 of the Petition for Certiorari, discloses that the questions raised and reasons relied upon for the allowance of the writ can be summarized as follows:

1. Are the cases of *Keefe, et al., v. Martin and Branches Drain District, et al., supra,* and *Township of Erin v. Engelbrecht, supra, res adjudicata* as to the claims of the plaintiff in this case?

2. Did the Macomb Circuit Court and the Michigan Supreme Court decide this case on the ground of *stare decisis* as well as on the ground of *res adjudicata?*

I.

PETITIONER'S ALLEGED CAUSE OF ACTION IS BARRED BY THE APPLICATION OF THE DOCTRINE OF RES ADJUDICATA

We do not agree with petitioner's statements with reference to the nature of class suits nor do we agree with its statement that the class suit theory has outlived its usefulness. We believe that the correct nature of class actions and the necessity therefor will fully appear in the following sections of this brief dealing with numerous class actions and the various court rules governing said actions. At this point it will suffice to say that class actions, the judgments in which are binding upon all members of the class, do perform a very necessary and useful function and that the binding effect of class judgments has been recognized in practically every state of the Union, including Michigan, in two very strong and exhaustive opinions in the cases of *City of Detroit v. Detroit United Railway*, 226 Mich. 354, and *American State Savings Bank, Trustee, v. American State Savings Bank*, 288 Mich. 78. Petitioner's present contention that the Federal class action on the Martin bonds did not result in a judgment binding upon all the members of the class is directly contradicted by strong and explicit statements in pleadings in the Keefe case filed by the same counsel who now represent the petitioner, by the findings of the Special Master in the Federal case, by the opinion and judgment of the District Court, by the opinion and decree of the Circuit Court of Appeals, by the opinions and decrees of the lower courts in this case, by numerous texts written on the subject, and by hundreds of cases decided by this Court and other courts throughout the various states of the Union.

A. The Doctrine of Res Judicata Is Applicable to this Case.

In *30 American Jurisprudence*, 908, the doctrine of *res judicata* is defined and explained as follows:

> "Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. * * *
>
> "Under the rule firmly established in the United States, the doctrine of *res judicata* extends to judgments of all courts. The doctrine prevails whether the judgment involved is rendered by the same court in which the subsequent action is prosecuted, or by a court of independent or concurrent jurisdiction. * * *
>
> "The doctrine of *res judicata* may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquillity. Public money and the interest of litigants alike require that there be an end to litigation which, without the doctrine of *res judicata*, would be endless. The doctrine of *res judicata* rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of *res judicata* not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings. * * *"

It becomes apparent from an examination of the records and files in the case of *Keefe v. Martin and Branches*

Drain District, 119 Fed. 2d. 157, that the parties, the subject matter and the relief sought are identical to those in this case. The parties are the same because the same bondholder which brings this case was represented as a member of the class of bondholders upon whose behalf the Keefe case was prosecuted and because the same bondholder actually participated in the Keefe case. The subject matter is the same because in both cases the validity of the Martin and Branches Drain District proceedings, and the bonds issued as a part of said proceedings to pay for said project, is in question. The relief sought is the same because in both cases the bondholders seek a judgment which would force the levy and collection of taxes to pay for their bonds.

B. The Federal Action for Recovery on the Martin and Branches Drain District Bonds Was a Class Suit.

The position of petitioner's counsel in the present case is to say the least somewhat anomalous. The bill of complaint in the Keefe case involving the Martin project was drafted with the express and clearly stated purpose of making the suit a class action on behalf of all the bondholders under the provisions of the Federal Court rules.

Among the provisions in the bill of complaint (sworn to by counsel who now represent petitioner in this case) in the Federal suit on the Martin bonds proving that the action was a class suit and that it was intended that the judgment therein would bind all the holders of Martin Drain District bonds, are the following:

R. 40, 89:

> "Both plaintiffs and such other bondholders have a common interest in the subject matter of this suit,

and plaintiffs signed this bill in behalf of such other bondholders as well as themselves."

R. 41, 89:

> Plaintiffs, therefore, intend by bringing this suit that the adjudication sought will be binding upon all holders of bonds of said district and all persons, firms or corporations who have paid or may be liable for said assessments levied in connection with the said drain."

R. 46, 90:

> "Said Martin Drain and Branches District bonds have been widely distributed among a large number of holders numbering as plaintiffs are informed and believe several hundred scattered throughout several states in the Union. Said bondholders constitute a class so numerous as to make it impracticable to bring them all before this Court. The questions involved in this suit are of common and general interest to all of such holders."

Among the prayers included in the bill of complaint of said Federal Court suit are the following:

R. 59:

> "That the court decree that all of the Martin Drain and Branches Drain District Bonds issued as above set forth, with the coupons thereto annexed, are valid and binding obligations of the Martin Drain and Branches Drain District according to their tenor, and that all of the special assessments in connection with which they were issued are valid and enforceable."

R. 60:

> "That the defendants Drain Commissioner, Board of Supervisors, County Clerk and County Treasurer be required by mandatory injunction of

this court to proceed from time to time, as required by law, to levy and collect assessments upon the taxable real property located within the boundaries of the district, and against the County of Macomb, Townships of Erin and Lake, and State of Michigan, said assessments to be sufficient in amount to pay all interest and principal now due and to become due upon all of said bonds, and sufficient further to meet the principal of said bonds and coupons appurtenant thereto at maturity, and to deposit in the Martin Drain and Branches Drain District Fund and to preserve intact for the benefit of plaintiffs and all other owners and holders of said bonds, all moneys to be derived from such assessments."

The foregoing statements are taken from the sworn bill of complaint in the Federal case and the *jurat* signed by present counsel for petitioner in this case stated as follows (R. 63):

"State of Michigan,
County of Wayne—ss.

Irvin Long and Elroy O. Jones, being duly sworn, depose and say:

That they are attorneys for the plaintiff named in the foregoing bill of complaint; that they have read the same and know the contents thereof; and that the bill of complaint is true of their own knowledge, except as to matters that are therein alleged on information and belief, and as to such matters they believe them to be true. Further, that they have executed the foregoing bill of complaint upon behalf of plaintiffs with the express authority of plaintiffs, and that they executed same on behalf of plaintiffs for the reason that practically all of the allegations of the bill of complaint are based upon knowledge of deponents acquired through examination of the records of the county officers of the County of Macomb, and for this

reason these deponents are the proper persons to verify said bill.

Irvin Long,
Elroy O. Jones.

Subscribed and sworn to before me this 30th day of December, A. D. 1932.

Betty Taylor,
Notary Public, Wayne County, Michigan.
My commission expires May 17, 1936."

The Keefe case on the Martin bonds was accepted in good faith by all the parties thereto as a class action on behalf of all the bondholders, and the Special Master, the District Court and the *Circuit Court of Appeals* in said case, without equivocation, all held the said suit to be a class suit. In the said Keefe case the District Court entered a decree in favor of all the bondholders, which, among other things, provided that all the bondholders were to be assessed on a *pro rata* basis for their respective share of the expenses and legal fees. In similar cases such as the case of *Keefe v. Royal Oak Drain District*, 87 Fed. 2d. 787, and *Keefe v. Mound Park Drain District*, No. 5736, District Court of the United States for the Eastern District of Michigan, Southern Division, where the projects were held to be legal drains, all of the bondholders were held to be entitled to the benefits of the decree and all the bondholders accepted the benefits of the decree. In like manner in the said Martin case, counsel, now representing petitioner herein, petitioned for and were granted the right to assess all bondholders, regardless of whether or not they had deposited their bonds with the committee, for their *pro rata* share of the expenses and attorneys' fees. There was nothing said at that time by counsel to the effect that said suits were "spurious class suits" and that non-depositing bondholders were not bound by the decree and were not bound to pay their share of the expenses and fees.

In answering petitioner's contentions we believe that it will be helpful to the Court at the outset to set out the various Federal Court rules authorizing class suits.

Rule 48, the original Federal rule on class suits, after providing that in the class suit one or more of a class may sue or defend for the whole class, further provided:

> "The decree shall be without prejudice to the rights and claims of all absent parties."

It is significant that in rule 38, which supplanted rule 48, the last clause quoted above was dropped out and rule 38 provided as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

It is in the provisions of rule 38 that we are particularly interested because the Federal class action on the Martin bonds was brought under the provisions of rule 38. With reference to this rule it is stated in Montgomery's Manual of Federal Jurisdiction and Procedure, Third Edition, page 540:

> "As a matter of convenience, therefore, and to prevent a failure of justice, a court of equity permits less than all of the members of the class to act as representatives of the entire body; *and the decree is deemed to bind the membership in general, as though all the individuals were before the Court.*" (Emphasis supplied.)

When the new Federal Rules of Civil Procedure were adopted rule 23 supplanted rule 38. Rule 23 provides as follows:

> "Representation. If persons constituting a class are so numerous as to make it impracticable to

> bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The above rule 23 is a substantial restatement of Equity Rule 38 (representatives of class) as that rule has been construed (see note of committee which drafted the rule, 2 Moore's Federal Practice, 2220). The said committee further stated:

> "The general test of Equity Rule 38 (representatives of class) that the question should be 'one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court' is a common test."

Petitioner is represented in this case by the same counsel who appeared for bondholders in the *Keefe v. Martin Drain District* case. It cannot be said that such representation is a determining factor in this case, but it is material to note that the claim of the bondholders by their counsel in the Federal litigation was the same as the respondents here now urge in support of the motion to dismiss the complaint. The substance of the previous position of the bondholders is not only reflected in the afore-

said District Court judgment in the Martin case, which was drafted by counsel for the bondholders for the District Judge's signature, but it is also clearly reflected in their brief filed in the United States Supreme Court in support of the petition for certiorari in the *Keefe v. Martin Drain District* case, where it is stated:

> "If this court permits the lower court decision to stand, bondholders will be barred from any other suit to recover these sums, for it is now adjudicated that they have no right at all to any of the relief prayed or granted by the District Court. A reversal of the judgment granting relief, and dismissal of the bill of complaint is a final determination that the District Court's judgment in every respect was wrong. We, therefore, trust that this court will not be misled by any assurance of respondents that this point need not be considered because in some other case bondholders can secure this relief. *If any other case were started they would promptly plead res judicata, and the plea would be sustained.*" (Emphasis supplied.)

C. The Decree in the Federal Suit on the Martin Bonds Is Res Judicata as to the Rights of Petitioner in this Case.

Petitioner concedes that the judgment of the Federal Court in the Keefe case dismissing the bill of complaint determined that the plaintiff bondholders in the Keefe case and the intervening bondholders do not hold valid bonds and that the binding effect of the Federal judgment is such that these parties cannot again sue on their cause of action. The substance of petitioner's claim in the lower court was that even though bondholders who were parties to the Federal litigation are bound by the judgment, that the plaintiff in this case, who was not a nominal party to the Federal suit, can sustain the present action because the Federal

judgment was a judgment *in personam* and cannot bind parties not actually before the Court by service of process or voluntary appearance.

It has always been the rule that in an action *in rem* a judgment can be entered affecting the rights of a person to the *res*, which is the subject matter of the action, without personal service of process on the party who owns the *res*. On the other hand it is the general rule that a binding judgment *in personam* cannot be rendered against a person who has not been made a party to litigation by service of process, *Pennoyer v. Neff*, 95 U. S. 714. However, there is a well-recognized exception to the rule stated in *Pennoyer v. Neff* and it is this exception that petitioner has failed to recognize throughout its brief in this case. The generally accepted rule of law which permits class actions constitutes the exception to the general rule. In referring to this exception to the general rule stated in *Pennoyer v. Neff* the cases and texts are obviously referring to a judgment *in personam* rather than to a judgment *in rem* because:

(1) The case of *Pennoyer v. Neff* dealt only with the question of the binding effect of a judgment *in personam* where service of process has not been made; and

(2) Obviously the fact that there can be a binding judgment in the absence of personal service in an action *in rem* is not an exception to the general rule because the right to such a judgment has always been accepted. The fact that the class suit doctrine does constitute an exception to the general rule that a judgment *in personam* will not be binding against one not made a party by service of process is clearly recognized by the United States Supreme Court and by the Michigan Supreme Court. In the case of *Hansberry v. Lee*, 311 U. S. 32—61 Supreme Court—115, it was held:

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U. S. 714; *1 Freeman on Judgments* (5th Ed.) at 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, *R. S. ¶ 905, 28 U. S. C. ¶ 687*, prescribe, *Pennoyer v. Neff, supra; Lafayette Ins. Co. v. French*, 18 How. 404; *Hall v. Lanning*, 91 U. S. 160; *Baker v. Baker, E. & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464; *Old Wayne Mut. L. Assn. v. McDonough*, 204 U. S. 8.

"* * * *To these general rules there is a recognized exception* that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. *Smith v. Swormstedt*, 16 How. 288; *Royal Arcanum v. Green*, 237 U. S. 531; *Hartford L. Ins. Co. v. Ibs*, 237 U. S. 662; *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; *cf. Christopher v. Brusselback*, 302 U. S. 500 * * *

"* * * In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. *Brown v. Vermuden*, Ch. Cas. 272; *City of London v. Richmond*, 2 Vern 421; *Cockburn v. Thompson*, 16 Ves. Jr. 321; *West v. Randall*, 2

Mas. 181; *Beatty v. Kurtz*, 2 Pet. 566; *Smith v. Swormstedt, supra; Supreme Tribe of Ben Hur v. Cauble, supra; Story, Equity Pleadings* (2d Ed.) at 98. * * *

"* * * *It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, Plum v. Goodnow*, 123 U. S. 560; *Confectioners' Machinery Co. v. Racine Engine & Mach. Co.*, 163 Fed. 914; 170 Fed. 1021; *Bryant E. Co. v. Marshall*, 169 Fed. 426, *or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. Smith v. Swormstedt, supra; cf. Christopher v. Brusselback, supra*, 503, 504, *and cases cited.*

"In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in the judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit. See *Bernheimer v. Converse*, 206 U. S. 516; *Marin v. Angedahl*, 247 U. S. 142; *Chandler v. Peketz*, 297 U. S. 609 * * *" (Emphasis supplied.)

In the case of *Detroit v. Detroit United Railway*, 226 Mich. 354, the Court stated:

"While the general rule undoubtedly requires that all *persons* interested must be made parties to any proceeding by which *they may be affected*, yet

to this rule there are well recognized exceptions, founded upon considerations of practical convenience, and adopted to avoid a denial of justice.

"These exceptions are thus stated in *Story's Equity Pleadings* (10th Ed.) at 97:

> "'(1) Where the question is one of a common or general interest and one or more sue or defend for the benefit of the whole. (2) Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole. (3) Where the parties are very numerous and though they have or may have had separate and distinct interests, yet it is impracticable to bring them all before the court.'

"In discussing the exceptions, the learned author says (pp. 96, 120):

> "'It has been well observed that the general rule, being established for the convenient administration of justice, ought not to be adhered to in cases in which, consistently with practical convenience, it is incapable of application; for then it would destroy the very purpose for which it was established. The exceptions, therefore, turn upon the same principle, upon which the rule is founded. They are resolvable into this, either that the court must wholly deny the plaintiff the equitable relief, to which he is entitled, or that the relief must be granted without making other persons parties.
>
> "'It is obvious that under such circumstances, the *interests of persons*, not actual parties to the suit, may be in some manner affected by the decree; but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice. Indeed, in most, if not in all, cases of this sort, the decree obtained upon such

a bill will ordinarily be *held binding upon all other persons* standing in the same predicament the court taking care that sufficient persons are before it, honestly, fairly, and fully, to ascertain and try the general right in contest. * * *'

"* * * It needs to be better understood that judgments only bind the parties and their privies, and that when it is sought to *bind persons* not made parties individually, that fact and the necessity, should be made plain to hand, that the court may determine whether sufficient parties are before it, and may take proper care of the rights of the absent. * * *.

" 'Another class of cases constituting an exception to the general rule as to parties is where the parties are very numerous and, although they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court, and on this account they are dispensed with. In this class of cases there is usually a privity of interest between the parties, but such privity is not the foundation of the exception. In all of these cases, however, there always exists a common interest or common right which the bill seeks to establish and enforce, or a general claim of privilege which it seeks to establish or to narrow, or take away. Under such circumstances, the interests of persons not actual parties to the suit, may be in some measure affected by the decree, but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice. In most, if not in all, cases of this sort, the decree obtained upon such a bill will ordinarily be held *binding upon all other persons* standing in the same predicament, the court taking care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest. * * * In this class of cases all the parties stand, or are supposed to stand, in the same situation, and

> have one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any. Therefore, the bill is permitted to be filed by a few on behalf of themselves and all others, or against a few, and yet to bind the *rights and interests* of the others!' * * *'" (Emphasis supplied.)

The foregoing case was cited with approval in the case of *American State Savings Bank, Trustee, v. American State Savings Bank,* 288 Mich. 78, and in said case the opinion of the Court in the *Detroit United Railway case* was quoted at length. In the *American State Bank case* the Court held:

> "There was no issue that could be raised by petitioner in such circumstances that would not affect all other depositors or holders of certificates in the same way. One certificate holder could not have greater rights as to his claim than another, and what would have been a defense or answer to the bill for one would have been the same for another. Their rights and defenses were identical. Petitioner was a member of the class represented by the named defendants. In *City of Detroit v. Railway,* 226 Mich. 354, the class suit doctrine was adopted by this court.
>
> "* * * It must necessarily be seen from the foregoing that there are in fact enough of the *bondholders of a class, before the court to give it jurisdiction over the absentees, and in making a decree, to completely and effectually bind their interests.*" (Emphasis supplied.)

On page 19 of its brief, petitioner quotes from the case of *American State Savings Bank v. American State Savings Bank, Trustee,* 288 Mich. 78, and attempts to convey the impression to this court that the Michigan courts apparently condemn the theory of class representation.

Petitioner states that the Michigan Supreme Court held in the American State Bank case that in a representative suit "there can be little danger that the interests of all will be properly protected and maintained," and argues from this statement, as quoted by petitioner, that the Michigan court is not concerned with the fact that injustice may result from the application of the doctrine of class representation, and petitioner further argues that the class suit theory has outlived its usefulness. Petitioner has not correctly quoted the statement of the Michigan Supreme Court in the American State Bank case and the argument based upon the incorrect quotation is just as incorrect as petitioner's quotation. Correctly quoted, the Michigan Supreme Court stated:

> "The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The repeated statements by the United States Supreme Court and the Michigan Supreme Court to the effect that the class suit doctrine permits a decree binding upon "*persons* not made parties individually" leave no doubt that in a class suit a decree can be properly entered in an action *in personam* which is binding upon persons who are not parties to the action but who were properly represented by other members of the class.

As a matter of fact, when the reason and purpose behind the rule which permits a class action is considered in connection with the facts in the Federal case on the Martin bonds, it becomes perfectly obvious that the facts in the Martin case fit exactly into the intent and purpose of the rule. It was the purpose of the rule to provide a

remedy where there was a question of common or general interest to members of a class too numerous to conveniently make them all parties to the action. The class action made it possible to obtain a decision as to the question of common or general interest binding upon all members of the class where it would otherwise have been impossible to obtain a judgment. It was, of course, required that the members of the class be adequately represented by a member or members of the class, who would properly represent the interest of all the members of the class. Certainly all the Martin bondholders were well represented in the Federal case on the Martin bonds. There was nothing which the absent members could have done which was left undone by the bondholders' committee in the litigation which lasted for a period in excess of ten years, and which was carried all the way to a final decision in the United States Supreme Court. By means of the representation given them all the members of the class had their day in court and the decision is binding upon all of them. If this were not true the class suit doctrine might as well not be in existence because it would be of no practical use whatsoever.

Petitioner is in substance arguing that despite the admitted fact that a major proportion of the Martin bonds have been declared void and the assessments cancelled, a judgment should be entered holding some bonds of the same series, of like date and tenor, to be valid bonds and providing for assessments to pay for said bonds. The statute which provided for the issuance of the bonds and the levy of assessments to pay the principal and interest of the bonds applied equally to all the Martin bonds. The actions of the drain commissioner, including the issuance of the Martin bonds, have been held to be illegal and void for want of jurisdiction. It is absolutely illogical to say that the drain commissioner was without jurisdiction so

far as some bonds were concerned, but that with reference to other bonds he had jurisdiction.

No court would have a right to find that some of the Martin bonds are void and that assessments levied to pay them should be cancelled and then find that others of the same series of bonds are valid and that assessments to pay them must be levied. Since it appears that a judgment affecting a major proportion of the Martin bonds must necessarily affect all of the Martin bonds, it follows that the interests of all of the bondholders are united and that, in fact, their rights are common rights. This is not a new theory so far as the Martin bondholders are concerned, but is one which was clearly recognized by the Martin bondholders in their suit in the Federal Court and by the attorneys who in that case represented all the Martin bondholders and who now represent plaintiff, because in paragraph three of the sworn bill of complaint (R. 40-41) in said case it was stated:

> "The number of holders of such bonds is very large and their names and whereabouts in many cases are unknown to plaintiffs, and for that reason it is impossible to make all of said bondholders parties hereto. *Both plaintiffs and such other bondholders have a common interest in the subject matter of this suit, and plaintiffs file this bill in behalf of such other bondholders, as well as themselves.*" * * * (Emphasis supplied.)

> "Plaintiffs, therefore, intend by bringing this suit that the adjudication sought will be binding upon all holders of bonds of said district, and all persons, firms and corporations who have paid or may be liable for special assessments levied in connection with the said drain."

The opinion of the Circuit Court of Appeals in the Keefe case held that the action was a class action and that all the bonds are void. There can be no explanation

for this decision other than that the Federal Court had determined that the action was a proper class action in which the Court had the jurisdiction to enter a decree binding upon all the members of the class. Petitioner in its brief has sought to create the impression that the District Court in the *Keefe v. Martin* case made no holding which could be construed to mean that its judgment was binding upon all the bondholders whether they were parties or not. However, the District Court did make a holding in its judgment which we think is one of the utmost importance because in so doing the District Court decided exactly the same question with reference to the same facts that are now before this court. We think this Court need go no further for a precedent controlling as to the law in this case than the following provision of the judgment of the said District Court:

R. 82-83:

> "9. The questions involved in this suit are of common or general interest to all persons who may now or hereafter own or hold said Martin Drain and Branches Drain District Bonds or the coupons appurtenant and appertaininng thereto, and such persons are constantly changing and constitute a class so numerous as to make it impracticable to bring them all before the Court, and plaintiffs have properly sued upon behalf of themselves and the whole of said class under Rule 23 of the Rules of Civil Procedure for the District Courts of the United States, *and this judgment shall be binding upon all of such persons to the same extent and with the same effect as though each of such persons had been a party plaintiff in this suit*" (Emphasis supplied).

The same question was before the Circuit Court of Appeals in the case of *Royal Oak v. Keefe, supra,* and the Court held:

> "We deal first with the status of the plaintiffs in respect to their right to sue in the federal court on behalf of the class for whose benefit the action was brought. They are all residents and citizens of states other than Michigan. The defendants are municipal corporations, legislative entities, or individual citizens of Michigan, and no question is raised as to the amount in controversy. *Equity Rule 38*, 28 U. S. C. A. following section 723 provides that: 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole' * * *.
>
> "The decree herein operates against the County of Oakland, and county officers, who are ordered and directed to cause special assessments and installments of drain taxes to be levied and collected in the manner provided by law for the purpose of *paying the plaintiffs and other holders of bonds and coupons which were due at the date hereof*" (Emphasis supplied).

Again the same question was before the special master in the case of *Keefe v. Mound Park Branches Drain District*, No. 5736, District Court of the United States for the Eastern District of Michigan, Southern Division, and he held in referring to the above Royal Oak opinion:

> "The character of the action as a class suit binding bondholders who did not deposit their bonds with the plaintiff, as well as the suability of the drain district, have been settled by the Royal Oak opinion."

D. Cases Cited by Petitioner Are Not Applicable to Facts in this Case.

Petitioner refers to a number of cases brought under the provisions of the Federal Minimum Wage Act which are on their face obviously distinguishable from the facts

in the Federal case on the Martin bonds. An examination of the other cases cited by petitioner readily shows that said cases do not support petitioner's present contention and in many cases relied upon by petitioner to sustain jurisdiction in this court, such as the case of *Hansberry v. Lee, supra,* the decisions definitely support the position of respondents. Most of the cases cited by petitioner in its brief were cited in briefs filed in the lower courts and respondents pointed out in their briefs filed in the lower courts the fact that said cases were not in point in this case or did not hold what petitioner claims for them. Petitioner now claims, on page 19 of its brief, that this court has made an unwarranted and erroneous assumption in its decisions in the cases of: *Smith v. Swormstedt,* 16 How. 288; *Hartford Life Ins. Co. v. Ibs,* 237 U. S. 662; *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356; and *Hansberry v. Lee,* 311 U. S. 32. It is apparent that petitioner feels that any court, whether it be the Michigan Supreme Court or this court, which makes a decision not in conformity with petitioner's theory has made an erroneous assumption and has handed down bad law. We respectfully submit that the cases cited above are correctly decided; that the Michigan Supreme Court was correct in following the above decisions of this court in applying the class suit doctrine, and that the decision of the Michigan Supreme Court in this case is correct and should not be disturbed.

E. The Case of Keefe, et al., v. Martin and Branches Drain District, et al., Supra, Was a Proceeding In Rem.

In the Macomb Circuit Court and the Michigan Supreme Court petitioner argued strenuously that the Keefe case on the Martin bonds in the Federal Court was a proceeding *in personam* and claimed that there cannot be a class

action binding upon all the members of the class in a proceeding *in personam* in the absence of service upon all the members of the class. Petitioner conceded in the lower courts that if the action in the Keefe case had been a proceeding *in rem* that the decision in said case would be binding upon all the Martin bondholders whether they were parties to the action or not. Petitioner has now switched its theory and apparently claims that regardless of whether the class action is a proceeding *in rem* or *in personam* there can be no binding judgment against a party who is not actually before the court. We have previously pointed out that class actions do perform a very necessary and useful function in our jurisprudence and that without class actions in many cases it would be impossible to bring a case to a legal determination. In the preceding sections of this brief we have proved that the decision in the case of *Keefe, et al., v. Martin and Branches Drain District, et al.,* was binding upon all the Martin bondholders whether they were actually present in court or not and that the class action constitutes the exception to the general rule that personal service must be had to bind interested parties in an action *in personam.* Petitioner contended in the Michigan Supreme Court in this case that the Keefe case was an action *in personam.* Petitioner conceded that if the Keefe case had been *in rem* that petitioner would have been bound by the decision in the Keefe case. Respondents filed a brief contending that the Keefe case was a proceeding *in rem* and the Michigan Supreme Court held in its opinion in this case that the Keefe case was a proceeding *in rem* and binding upon all the Martin bondholders (Record 166-168). This decision of the Michigan Supreme Court, in accordance with the principle announced by this court in the case of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, is binding upon the Federal Courts. The question of whether the

Keefe case was a proceeding *in personam* or *in rem* was thoroughly briefed by respondents in the Michigan Supreme Court has been decided by the Michigan Supreme Court and because of the Erie Railroad case decision it seems unnecessary to review those decisions here.

F. The Present Suit Is Barred by a Prior Judgment of the Macomb Circuit Court in the Case of Township of Erin v. County of Macomb, Macomb County Board of Supervisors, Macomb County Drain Commissioner and Macomb County Treasurer, Chancery No. 8505.

In the above case the unappealed from decree of the Circuit Court provided as follows:

"DECREE

"At a session of said court held in the City of Mt. Clemens, Macomb County, Michigan, on the 16th day of September, A. D. 1932.

Present: Honorable James E. Spier, Circuit Judge

This cause having come on to be heard on its merits, and upon the pleadings filed in this cause, and upon the proofs taken in open court, it is ordered, adjudged and decreed:

That all proceedings and actions heretofore taken by the defendants as set forth in the bill of complaint filed in this cause, relative to the survey, location, etsablishment and construction of the Martin Drain, the extension of the outlet thereof, and all apportionments and assessments made thereon, against the plaintiffs and the lands of said plaintiff, are decreed to be illegal, unlawful, null and void, and of no effect whatsoever, and said apportionments and assessments be and are hereby cancelled, vacated and set aside, and the said lands

of plaintiffs be and are hereby forever discharged of and from the apparent lien thereof:

That the defendant, Thomas F. Simms, Treasurer of Macomb County, Michigan, and his successors in office, be and are hereby perpetually enjoined and restrained from collecting or attempting to collect any of the assessments levied against the said respective plaintiffs, or the respective parcels of land taxed or assessed against them in the tax roll for the location, establishment and construction of said Martin Drain and from attempting to collect of said plaintiff for the non-payment of said assessments.

James E. Spier,
Circuit Judge."

Under the theory of the decision of the United States Supreme Court in the case of *Kersh Lake Drainage District, et al., v. Johnson,* 84 Law Ed. 634, which decision was held by the Circuit Court of Appeals in the case of *Keefe, et al., v. Martin and Branches Drain District, supra,* to be applicable to the rights of the bondholders of the Martin Drain District, the above decree is *res judicata* of the rights of the bondholders because the bondholders of said drain district were represented by the drain commissioner.

The lower court in this case held with defendants on this issue when it held:

"It is not necessary for a final decision of this caes to hold that the Township of Erin case is *res judicata* of the rights of all bondholders because this court finds and determines that the Circuit Court of Appeals settled this question in the Federal Martin bond suit when it held:

'The officers of the drain district represented all the creditors of the district, including the bondholders, in the state court cases, and thus

> appellants had notice and were given their day in court in those cases. In the cases where these projects have been found invalid by the Supreme Court of Michigan or lower state courts whose judgments have become final, the drain commissioners were parties and the holdings were uniformly to the effect that such illegality made the entire proceedings void, deprived the drain commissioner of jurisdiction in the premises, and required cancellation of the assessments. Appellees were not made parties to the suits in the state court, and the validity of the bonds was not there in issue, and upon this ground the District Court held that the Michigan decisions did not bind the appellees in the instant cases. However, under the decision of the United States Supreme Court in *Kersh Lake Drainage Dist. v. Johnson*, 309 U. S. 485, announced subsequent to the decision of the District Court herein, those cases are *res judicata* as to the determinative facts of this controversy.' "

The Michigan Supreme Court in the case of *City of Highland Park v. Clark*, 300 Mich. 501, clearly stated the rule of law applicable to these illegal projects and wound up its opinion by citing with approval the decision of the Federal Court on the Martin bonds, which petitioner now says is not correctly decided. The Michigan Supreme Court in the said Highland Park case stated:

> "Careful consideration requires the conclusion that the decision in the instant case is governed by the reasoning in *Village of Oak Park v. Van Wagoner, supra.* Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void

and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, 'The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law.' We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof * * *."

"If the levy of a tax in 1935 'would constitute the taking of property without due process of law,' the levying of a tax now would also constitute the taking of property without due process of law * * *."

"Since we held in 1935 that it was illegal to levy and collect any tax assessed as a result of this project, under the doctrine of *stare decisis* we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project * * *."

"The Federal Courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. *Bloomfield Village Drain District v. Keefe,* and four other cases (C. C. A. (6th Circuit), March 14, 1941), 119 Fed. 2nd 157."

Thus in the foregoing language the Michigan Supreme Court gave its approval to the Federal Court decision holding the bonds of all Martin bondholders void, and has again in this case given its approval to the Federal Court decision in the Keefe case by holding that decision to be *res judicata* in this case. This court refused to grant certiorari in the Keefe case and we respectfully submit that this court should refuse to grant certiorari in this case where the Michigan Supreme Court has followed the decision in the Keefe case.

II.

THE MACOMB CIRCUIT COURT AND THE MICHIGAN SUPREME COURT DECIDED THIS CASE SOLELY ON THE GROUNDS OF RES ADJUDICATA

Petitioner's claim that the decision of the Michigan Supreme Court in this case is based both upon the applicability of the doctrine of *res judicata* and *stare decisis* is incorrect. The Michigan Supreme Court adopted in full the opinion of the lower court which based its decision solely on the grounds of *res judicata*. On page 2 of the opinion of the lower court (R. 142) the lower court stated: "Defendants' motion cites six grounds as reasons for dismissal of the bill of complaint but the court finds it necessary to consider only one of the grounds which come within the provisions of Court Rule No. 18, namely, that the cause of action is barred by a prior judgment." The opinion of the lower court holding that defendants' motion to dismiss should be granted was based entirely on the ground that prior decisions involving the same parties and same subject matter involved in this case are *res judicata* as to the issues in this case. The Macomb Circuit Court made no mention of the doctrine of *stare decisis*. The Michigan Supreme Court, after quoting in full the opinion of the lower court, went on to say:

> "Even if we were to hold that the lower court was in error in its reasons for the dismissal of the bill of complaint, *which we do not*, we would feel compelled to affirm the decree of dismissal by reason of the rule of *stare decisis*." (Emphasis supplied.)

It is obvious, therefore, that the basis of the Michigan Supreme Court decision in this case was *res judicata* rather than *stare decisis*.

III.

CONCLUSION

The bonds upon which petitioner is suing are void bonds. They have been held to be illegal and void because of a complete lack of jurisdiction in the Drain Commissioner in the cases of *Township of Erin v. Engelbrecht, supra,* decided by the Macomb Circuit Court, and *Keefe, et al., v. Martin and Branches Drain District, et al.,* decided by the Circuit Court of Appeals. The Township of Erin case was held to be *res adjudicata* as to the rights of all Martin bondholders by the Circuit Court of Appeals in the Keefe case (Record 34-36). The Macomb Circuit Court and the Michigan Supreme Court, in deciding this case, have held that the decision in the Keefe case is *res adjudicata* as to the petitioner herein (Record 157-168). The Keefe case was a class action, and, unless this court is prepared to scrap the doctrine of class representation which this court has so often approved, there can be no merit to petitioner's contention that petitioner is not bound by the decision in the Keefe case. The Keefe case was a class action, the decision in which was binding upon all the Martin bondholders, and because it was a class action in which all the members of the class of Martin bondholders were properly represented the Michigan Supreme Court was correct in its decision that the petitioner had its day in court. Petitioner concedes that the Martin bondholders were well represented in the Keefe case and that the bondholders' case was fully and fairly presented. Under the class action doctrine applicable in the Keefe case and under the decision of *Kersh Lake Drainage District, et al., v. Johnson, supra,* applicable to the Township of Erin case, petitioner has had its day in court and has not in any way been deprived of its constitutional right to due process of law.

In conclusion we again wish to point out to this court that petitioner's present contention that it has been deprived of its constitutional right to due process is but an afterthought, and one which was not raised until after the decision of the Michigan Supreme Court. Petitioner did claim in a brief filed in the Michigan Supreme Court that it was deprived of its right to due process of law because the Macomb Circuit Court had decided the case on the ground of *stare decisis* as well as *res adjudicata*. The fact of of the matter is, however, that the decisions of the Macomb Circuit Court and the Michigan Supreme Court were based entirely upon the application of the doctrine of *res adjudicata*. We have pointed out that, in addition to the fact that petitioner was represented as a member of the class in the suit on the Martin bonds, the petitioner knew of the drain litigation involving the Martin bonds; that petitioner was active in drain litigation in Michigan which seriously affected the decision of the Federal District Court in the Keefe case; that petitioner filed briefs in the Circuit Court and in this court in support of the claims of the bondholders in the Keefe case and that attorneys for all the Martin bondholders in the Keefe case who now represent petitioners herein stated in a brief filed in this court in the Keefe case that if the Martin bondholders were to start any other case on the Martin bonds, respondents would promptly plead *res adjudicata* and the plea would be sustained (Record 93-94). In this regard we agree with counsel for petitioner and respectfully submit that for the reasons stated this court should deny the petition for certiorari.

Respectfully submitted,

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